IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 462 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KANUBHAI J PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 462 of 2004

MR PM VYAS for Petitioners.

MR HIREN P VYAS for Petitioners.

MS SEJAL H VYAS for Petitioners.

MR KT DAVE, LD. APP for Respondent No. 1

MR ASHUTOSH R BHATT for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 31/08/2004

ORAL JUDGEMENT

Heard Mr. P.M. Vyas, learned counsel appearing

for the petitioners-orig. accused nos.2 and 3.

2. Rule. The formal service of Rule is waived by Mr.K.T. Dave, ld. APP, on behalf of the respondent no.1-State and Mr.Ashutosh R. Bhatt, learned counsel appearing for the respondent no.2-orig.complainant.

3. This Revision Application is taken up for final hearing today on consent.

4. Having considered the contents of the present Revision Application, especially page:13 (Annexure-A) and on perusal of the xerox copy of the cheque in question shown to the Court today by the learned counsel appearing for the petitioners-orig. accused nos.2 and 3, it appears that for the alleged transaction the cheque in question was signed and issued by the orig. accused no.1-Bhadresh K. Patel. It is submitted by the petitioners that there is no positive averment or even indirect allegation in the complaint that any one of the present petitioners-orig.accused nos.2 and/or 3 was incharge of and was responsible to the firm for the conduct of the business of the firm at the relevant point of time. Of course, there is some strength in the say of respondent no.2-orig.complainant that both the petitioners were partners of the firm and doing business in the name and style of 'Shrinath Polymers'. The orig. accused no.1-Bhadresh has signed the cheque in question in the capacity of one of the partners.

5. Placing reliance on the decision of Bombay High Court (Panaji Bench), reported in 1994 Company Cases 487, in the case of Rajan Kinnerkar v. Eric Cordeiro and another, it is argued by Mr. Bhatt that a complaint normally should not be quashed and set aside at an early stage merely on the ground that the accused was not a director of the company at the time when the cheque was presented. The Bombay High Court in the cited decision has held that the complainant must be given an opportunity to lead evidence as to the status of the accused persons shown in the complaint.

6. The point brought before the Court is of different type. It is rightly argued by Mr.Vyas that in absence of clear averments, considering the scheme of Sections 138 and 141 of the Negotiable Instruments Act, the learned Magistrate ought not have issued process against the present petitioners and unnecessary they ought not have been dragged to prosecution.

7. In support of their submissions, the petitioners

have mainly placed reliance on the ratio of the decision in the case of K.P.G. Nair v. M/s. Jindal Menthol India Ltd., reported in 2001 SCCr.R. 27. The attention of the Court is drawn to relevant paragraph nos:6 and 18 of the cited decision. The Court has also considered the ratio of decision in the case of Katta Sujatha (Smt.) v. Fertilizers and Chemicals Travancore Ltd. and another. Mr. Vyas has mainly placed reliance on the decision of this Court while dealing with Criminal Revision Application Nos.46/2004 and 47/004, in the case of Kartik Kiritbhai Parekh v. State of Gujarat, decided on 17th June, 2004 and submitted that keeping the ratio in the background of the decision in the case of Priti Bhojnagarwala v. State of Gujarat and others, reported in 2002 (1) GLR 293, the petitioners should not be compelled to face the prosecution of a serious offence on the bald statement made in the complaint and where there is no allegation or averment in the complaint that both or any of the petitioners were concerned with the day to day business of the firm or were aware about issuance of cheque in question. It is rightly submitted by Mr.Vyas that the ratio of the decision in the case of Kartik Parekh (supra) would apply to the present case.

8. In view of the nature of submission advanced by Mr.Vyas, the alternative arguments advanced by Mr. Bhatt shall have to be accepted, wherein he has rightly submitted that as observed by this Court in the case of Kartik Parekh (supra), the present respondent no.2-orig. complainant should be given a permission to lead evidence and to implicate both or any one of the petitioners as accused praying appropriate relief under Section 319 of the Code and if the complainant is able to lead evidence to the prima facie satisfaction of the Court that both or any one of the petitioners was concerned with the business and especially the day to day business of the firm and they were aware about the issuance of cheque in question. The date of alleged retirement from the partnership firm is not relevant as undisputedly the cheque in question was given in the capacity of a partner, so the liability of the accused no.1 who has signed the cheque is also confirmed. I would like to reproduce the relevant observations made by this Court in the case of Kartik Parekh (supra) for the sake of brevity and convenience. According to this Court, paragraph no.12 of the cited decision is relevant, which is as under :

"12. The say of the respondent no.2-orig.complainant is that the claim of

Section 141 creates vicarious liability and it would be wrong to infer that the other Directors or partners were not aware about the actual available fund in a particular Bank Account from which the Company has issued cheques of the amount of more than Rs.50 lakhs or one crore. So the learned Magistrate while issuing process cannot be said to have committed any error either of law or of fact and, therefore, the order of issuance of process should be treated as a simple order of interlocutory in nature. One of the arguments advanced before this Court is that the order of issuance of process is interlocutory in nature and, therefore, the proceedings in the nature of Criminal Revision would not lie in view of the statutory bar of sub-section (2) of Section 397 of the Criminal Procedure Code. But this argument is not found attracted and an accused, if he is able to convince the Revisional Court, the complainant under certain vague allegations or without making any specific categorical statement in the complaint or even in the verification recorded by the learned Magistrate before issuing process, should not force the accused to face the criminal proceedings and such an accused can also pray that as and when the Court receives any evidence involving the accused in the crime or the complainant is able to lead any evidence under which a reasonable inference can be drawn about either constructive or vicarious liability of a particular accused, at that stage he can be joined as an accused in view of Section 319 of the Criminal Procedure Code.

9. Without entering into further discussion, the present Revision Application is allowed. The order under challenge dated 19th April, 2004 passed by the learned Metropolitan Magistrate, Court No.5, Ahmedabad, in Criminal Case No.217/2002, below Exh.2, is hereby quashed and set aside and the proceedings against the present petitioners-orig.accused nos.2 and 3 are hereby terminated.

10. It is clarified that in view of the above observations, it will be open for the complainant, if he is able to satisfy the Court by leading evidence about the involvement of the present petitioners-orig. accused nos.2 and 3 in the offence referred to in the complaint, by leading reasonable evidence, to join the present petitioners-orig. accused nos.2 and 3 as a

in the same proceedings at any subsequent appropriate stage of the trial. Even otherwise, it will be open for the Court to join the petitioners-orig. accused nos.2 and 3 as accused, if the Court by itself is satisfied with the evidence to be led by the complainant during the trial as to the involvement of the petitioners-orig. accused nos.2 and 3 in the offence, that shall not be viewed as a fresh or second prosecution.

11. With the above observations, the present Revision Application is hereby allowed. Rule is made absolute accordingly.

(C.K. Buch,J)

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